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No. 93-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI
and
ALUMAX FOILS, INC.,
Petitioners,

vs.

JANETTE M. LOHMAN, Director of Revenue,
and
DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, and
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. When a state imposes a statewide use tax upon *inter*state sales at a rate which, in more than 50% of the state's taxing jurisdictions, is higher than the sales tax rate on identical *intra*state sales, is the resulting discrimination against interstate commerce constitutionally irrelevant merely because in the aggregate the state collects more sales taxes than use taxes?

2. Does *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), validate a state tax scheme which in numerous instances burdens interstate commerce more heavily than intrastate commerce? If so, is *General American* inconsistent with *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and should it be expressly overruled?

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Missouri, filed June 29, 1993, are reported at 857 S.W.2d 182 and are reproduced in Appendix A to the Petition for Writ of Certiorari ("Pet. Apdx.") at pages A-1 and A-25, respectively. The unreported judgment of the Circuit Court of Cole County dated July 15, 1992, is reproduced in Appendix B to the Petition at page A-35.

JURISDICTION

The opinion and judgment of the Missouri Supreme Court en banc was entered on June 29, 1993. No rehearing was sought.[1] The Petition for Writ of Certiorari was filed in this Court on September 10, 1993, and was granted on December 6, 1993. The jurisdiction of this Court rests on 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 3:

> "The Congress shall have power .... To regulate commerce with foreign nations, and among the several states...."

MISSOURI REVISED STATUTES (1992):

Section 144.020:

> **"Rate of tax.** - 1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:
>
> > "(1) Upon every retail sale in this state of tangible personal property, a tax equivalent to four percent of the purchase price paid or charged . . . ."

[1] As the decision below was rendered by the Missouri Supreme Court en banc, no petition for rehearing is necessary to make the judgment below final for purposes of this Court's jurisdiction. STERN, GRESSMAN, SHAPIRO & GELLER, SUPREME COURT PRACTICE, pp. 110-11 (7th ed. 1993), citing *Southern R. Co. v. Clift*, 260 U.S. 316 (1922); *Market Street R. Co. v. Railroad Comm'n of California*, 324 U.S. 548, 551-52 (1945).

Section 144.610:

> **"Tax imposed, property subject, who liable.** - 1.A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property ... in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020."

Section 144.748:

> **"Additional use tax . . .** - 1. In addition to the taxes imposed by section 144.610, there is hereby imposed an additional use tax in the amount of one and one-half percent upon all transactions which are subject to the taxes imposed under sections 144.600 to 144.745."

CONSTITUTION OF MISSOURI (1945, as amended):

> **Article IV, Section 43(a).** . . . "For the purpose of providing additional moneys to be expended and used by the conservation commission, department of conservation... an additional sales tax of one-eighth of one percent is hereby levied and imposed...; and an additional use tax of one-eighth of one percent is levied and imposed . . . ."
>
> **Article IV, Section 47(a).** . . . "For the purpose of providing additional moneys to be expended and used by the department of natural resources... an additional sales tax of one-tenth of one percent is hereby levied and imposed . . .; and an additional use tax of one-tenth of one percent is levied and imposed . . . ."[2]

[2] For a more complete understanding of the entire Missouri sales/use tax scheme, we have reproduced in the Addendum to this brief a more comprehensive version of the relevant statutes and constitutional provisions.

STATEMENT OF THE CASE

This case challenges the constitutionality of §144.748 of the Revised Statutes of Missouri ("RSMo"), which imposes an additional state-wide use tax of 1.5% for the privilege of using, storing or consuming tangible personal property within the State of Missouri. The additional use tax assessed under § 144.748 brings to 5.725% the total use tax charged on all purchases from out-of-state. Missouri also assesses a state-wide sales tax on all sales of tangible personal property in Missouri, but only at the rate of 4.225%. Local government units are authorized to impose additional local sales taxes. In 53% of the taxing jurisdictions in the state (841 out of 1573), however, the additional sales tax adopted locally is less than 1.5%, resulting in a total sales tax applied to in-state purchases of less than 5.725%. Therefore, in those 841 localities a resident purchasing an item from a local merchant would be taxed at a lesser rate than his neighbor who bought the identical item from a vendor in another state for use in Missouri.

The Parties

Petitioner Associated Industries of Missouri ("AIM") is a not-for-profit corporation operating as a trade association comprised of individuals and organizations engaged in business in Missouri and elsewhere. Although all of the members of AIM do business in Missouri, some of them are "multi-state corporations whose principal operations and headquarters are located outside of Missouri" (JA 32 ¶2). These members pay sales and use taxes, when applicable, on purchases of tangible personal property made within and without Missouri (JA 33 ¶4).

Several members of AIM also collect and remit Missouri use taxes on sales of personal property made by them outside of Missouri to purchasers located within Missouri (*id.*). When those companies sell goods into Missouri, they are required to collect the 1.5% additional use tax that is challenged in this case.

Petitioner Alumax Foils, Inc., is a member of AIM and is headquartered in St. Louis.[3] It buys property from sellers within and without Missouri and pays sales and use taxes, respectively, on such purchases. Alumax pays approximately $3,000 in Missouri use taxes each month (*id.* ¶5), more than one-quarter of which is attributable to the additional 1.5% tax imposed by § 144.748. Alumax also purchases products in Missouri which are subject to local sales taxes at rates less than 1.5% (*id.*). The parties stipulated that compliance with § 144.748 will impose "significant economic costs" upon AIM's members and Alumax (JA 34 ¶8).

Respondent Janette Lohman is the Director of Revenue of Missouri and is responsible for the collection of Missouri use taxes. She is the successor to Raymond T. Wagner, who was the principal defendant below, and is sued in her official capacity (JA 33 ¶6).

Respondents DeLong's, Incorporated, The City of Blue Springs, Gary Markenson, The Missouri Association of Counties, The Missouri Municipal League, and The Associated General Contractors of Missouri intervened as defendants below in support of the validity of § 144.748. The intervening business entities alleged that they would be at a "competitive disadvantage" if petitioners were successful in this action (JA 16, 18).

Missouri's Sales/Use Tax Scheme

Missouri imposes a basic 4% sales tax on all sales of tangible personal property, pursuant to § 144.020.[4] This tax is augmented by an additional levy of one-eighth of one percent under Article

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[3] Alumax Foils, Inc., is a subsidiary of Alumax Inc. It has no subsidiaries that are not wholly owned.

[4] All references are to RSMo (1986), as amended to date, unless otherwise noted.

IV, § 43(a) of the Missouri Constitution and by another one-tenth of one percent pursuant to § 47(a) thereof. Hence, the total state-wide sales tax is 4.225%. In addition, a number of statutes authorize cities and counties, with approval of the voters, to enact local sales taxes for various purposes such as law enforcement, tourism, public works, capital improvements, transportation, etc.[5] There are no statutes authorizing local political subdivisions to levy use taxes.

The Missouri "compensating use tax" is authorized by §144.610, which imposes a levy "for the privilege of storing, using or consuming within this state any article of tangible personal property... in an amount equivalent to the percentage imposed on the sales price in the sales tax law in Section 144.020." Because the one-eighth percent additional levy contained in § 43(a) of Article IV of the Constitution and the one-tenth of one percent additional tax imposed by § 47(a) are, by their terms, applicable to use taxes as well as sales taxes, the state-wide basic use tax is therefore 4.225% — exactly equivalent to the state-wide sales tax.

In 1990, in an attempt to compensate by way of a use tax for the additional sales taxes levied at the local level, the Missouri General Assembly enacted § 144.747, which provided as follows:

> "Other provisions of law notwithstanding, whenever a political subdivision is authorized to levy a sales tax, the political subdivision shall also be authorized to levy a use tax at the same rate which shall be applied in the same manner as the state use tax pursuant to this chapter." Mo. Laws 1990, H.B. 960.

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[5] *See, e.g.*, §§ 66.600-66.635; 67.500-67.545; 92.400-92.420; 94.500-94.519; 94.600-94.655; 94.700-94.745.

That measure, though duly passed by the General Assembly and signed by the Governor, was never implemented. Instead, in 1991 it was repealed as part of House Bill No. 25, which became §144.748, effective July 1, 1992, and which imposes the additional use tax of 1.5% challenged in this case.

A state-wide use tax of 5.725% is thus applicable to every interstate transaction, whereas in-state transactions carry a sales tax ranging from 4.225% to more than 7%, depending on the local sales tax rate. The parties stipulated (JA 66) that this taxing system produces the following pattern in the various taxing jurisdictions in Missouri:

Local Sales Tax Rate	No. of Jurisdictions	Total Taxable Sales
Under 1.5%	841 (53.46%)	$ 2,447,630,436 (6.86%)
1.5%	373 (23.71%)	14,199,531,525 (39.82%)
Over 1.5%	359 (22.82%)	19,016,236,886 (53.32%)
	1,573	$35,663,398,848

Although the use tax is literally applicable to *all* products to be used, stored or consumed within the state, §144.615(2) provides an *exemption* for all transactions which are subject to Missouri sales tax. With regard to property purchased in other states, §144.615(5) allows a *credit*, but only to the extent that such property has been subjected to a sales or use tax by the other state; the purchaser is required to pay a use tax to the extent of any differential.[6]

It is the responsibility of the nonresident vendor to collect the use tax if he is subject to the jurisdiction of Missouri (*i.e.*, if he has the requisite nexus). If a Missouri purchaser cannot produce

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[6] Both of these provisions are made applicable to the additional use tax by §144.748.2.

a receipt from his vendor indicating collection of the use tax, the burden remains on the purchaser to pay the use tax (§144.635).

Vendors are required to file returns quarterly and to remit use taxes collected from Missouri customers (§144.655). The failure to file a return or to pay a tax due, and the filing of any false return, can result in the imposition of criminal penalties (§§144.735-45).

The additional use tax is collected by the respondent Director of Revenue. She is authorized by statute to keep one percent of collections to reimburse her for her costs, and is directed thereafter to distribute the remaining proceeds to each political subdivision that imposes a local sales tax based upon that subdivision's pro rata percentage of sales tax collections (§§144.748.3, 144.748.6, 144.748.7).

Proceedings Below

Petitioners filed this action in the Circuit Court of Cole County, Missouri, claiming that the additional state-wide 1.5% use tax violates, *inter alia*, the Commerce and Equal Protection Clauses of the United States Constitution because it discriminates against out-of-state sales by imposing a use tax at a greater rate than would be applicable via the sales tax to many in-state sales of identical items (JA 7-8). The parties stipulated all of the relevant facts (JA 32-37). The state trial court rejected the constitutional challenge and entered judgment for respondents (Pet. Apdx. A-35). On direct appeal to the Missouri Supreme Court, the judgment was affirmed by a 6-1 vote, Chief Justice Robertson dissenting (*id.* at A-1, A-25).

The majority opinion of the Supreme Court of Missouri acknowledged the stipulated fact that in a sizeable number of cities and counties the use tax rate is higher than the sales tax rate. The court ruled that any resulting discrimination against interstate commerce was constitutionally insignificant even though

26.5% of the state's population lives in counties where the use tax rate exceeds the sales tax rate, pointing out that only 6.86% of the intrastate sales were made in such counties (*id.* at A-16-18). The court also emphasized that, because some counties have sales tax rates in excess of 5.725%, the overall amount of use tax collected state-wide is less than the aggregate sales tax collections (*id.* at A-17).

The majority placed heavy reliance on this Court's decision in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926). *General American* said, primarily in connection with a discussion of the Equal Protection Clause, that a property tax is not unconstitutional merely because it does not treat nonresidents and residents with "mathematical exactness." The Missouri court construed *General American* to permit the Missouri system of taxation "even though in some instances they may burden interstate commerce more heavily than intrastate commerce" (Pet. Apdx. A-12). The majority attempted to distinguish later Commerce Clause cases on the ground that the taxes invalidated there "imposed higher use taxes both on an individual basis and on an average statewide basis" (*id.* at A-16). The court further held that even if those cases are not distinguishable, they are inconsistent with *General American* and that "in the face of inconsistent precedent from the United States Supreme Court, we will presume our state statutes to be constitutional" (*id.* at A-19 n.9).

The court below acknowledged that "[a]n exacting application of the dicta contained in *Halliburton* [*Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963)] and certain cases following it would require invalidating §144.748" (Pet. Apdx. A-16). But finding that the Commerce Clause "does not require identical treatment of all taxpayers," the majority upheld the taxing scheme because overall "it imposes a lesser tax burden on interstate commerce than it does on intrastate commerce and the

local discrepancies do not rise to a level of quality or quantity that would demand a different result" (*id.* at A-19).[7]

Chief Justice Robertson dissented (*id.* at A-25). He rejected the majority's statistical analysis and argued that there is no *de minimis* exception to the Commerce Clause. He criticized on numerous grounds the majority's reliance on the equal protection discussion in the 1926 *General American* case and observed that the result reached there was at odds with numerous more recent Commerce Clause holdings. He concluded his dissent with these comments:

> "With respect, I do not believe the constitutionality of Missouri's tax scheme here is even fairly debatable. This state's tax is simply unconstitutional" (Pet. Apdx. A-34).

Petitioners sought review in this Court by way of certiorari, and on December 6, 1993, certiorari was granted.

SUMMARY OF THE ARGUMENT

Missouri imposes a basic state-wide sales tax of 4.225% on all sales of retail goods and a "compensating use tax" of 4.225% on goods to be used, stored or consumed in Missouri. So far, so good from a constitutional perspective. But the balance of the Missouri system departs markedly from the requirement that use taxes not discriminate as between foreign merchants and their resident competitors. In fact, the 1.5% mandatory state-wide additional use tax imposed by § 144.748 results in a higher rate applicable to interstate transactions than the sales tax rate charged on local sales in more than 53% of the cities, counties and other taxing districts in the state, which contain more than 26% of the state's population (JA 104, 107).

[7] The court also rejected petitioners' federal equal protection and due process claims and several state constitutional challenges. Only the Commerce Clause question has been brought to this Court.

The Commerce Clause requires equality of treatment between local and interstate commerce. *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981). A taxing statute discriminates against interstate commerce if it provides a direct commercial advantage to local business. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). A state may not tax a transaction more heavily when it crosses state lines than when it occurs entirely within a state, *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), and may not employ a tax system to induce a resident purchaser to buy at home rather than shop elsewhere. *Boston Stock Exchange*, 429 U.S. at 332.

Use taxes have only two functions: (1) to protect resident sellers from competitive disadvantages *vis-a-vis* nonresident competitors due to sales taxes required to be collected on local sales, and (2) to raise revenue. This Court has upheld use taxes on interstate transactions to the extent they are truly "complementary" to sales taxes imposed on corresponding local activities. In *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), the Court approved a use tax which provided exact parity between the nonresident merchant and his local competitors. Subsequent cases have consistently struck down any sales/use tax system that did not comply with the "strict rule of equality adopted in *Silas Mason*." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 73 (1963); *see also Maryland v. Louisiana*, 451 U.S. at 760 ("[w]e need not know how unequal the tax is before concluding that it unconstitutionally discriminates"); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268-69 (discrimination affecting less than one percent of industry products is constitutionally intolerable).

The Missouri additional use tax cannot be validated on the theory relied on by the state supreme court: *i.e.*, that the widespread discrimination existing on the local level is acceptable because on a state-wide basis sales tax collections are, in the aggregate, greater than use tax revenues. The only justification

for a use tax is to level the playing field between local and nonresident competitors. It is a gross distortion to argue that discrimination against a Kentucky merchant shipping washing machines into Dunklin County, Missouri, where the sales tax rate is only 4.225% (JA 45), can constitutionally be "compensated" by a transaction involving an Iowa vendor selling refrigerators into Kansas City, where the sales tax rate is 6.475% (JA 51). The taxes are in no way "complementary" or "compensating."

This Court has invariably refused to allow states to offset the effects of discriminatory taxes by use of other taxes on different events or transactions. *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987); *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987); *Maryland v. Louisiana*, 451 U.S. at 759; *Armco, Inc. v. Hardesty*, 467 U.S. at 643. The proper comparison is between the out-of-state merchant and the in-state taxpayer who is most similarly situated. *Halliburton*, 373 U.S. at 71; *Boston Stock Exchange*, 429 U.S. at 332.

The state's attempt to defend the state-wide additional use tax on the basis of administrative convenience is unavailing, and similar arguments have regularly been rejected by this Court. *See Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance*, ___ U.S. ___, 112 S.Ct. 2365, 2371-72 (1992); *Halliburton*, 373 U.S. at 74. It ill-behooves any state to complain that it is incapable of devising a system of raising revenue that treats local and foreign interests even-handedly.

The Missouri Supreme Court, while recognizing that the additional use tax would not survive scrutiny if measured by *Halliburton* and its progeny, nevertheless sustained its validity by invoking the 68-year-old opinion of this Court in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926). *General American* does not validate a sales/use tax scheme which disadvantages a sizeable segment of the intrastate market because,

inter alia, (a) it was primarily an equal protection, not a Commerce Clause, case; (b) it did not involve use taxes or the *Silas Mason* notion of "compensating" use taxes; and (c) it is contrary to numerous more recent Commerce Clause cases demanding strict parity between local and interstate commerce.

By enacting § 144.748, the Missouri General Assembly flouted the Commerce Clause in an effort to aid Missouri business and tried to swell the state's coffers at the expense of interstate commerce. The Missouri Supreme Court, mindful of state fiscal needs, abdicated its constitutional responsibility and gave little more than a perfunctory nod to this Court's Commerce Clause jurisprudence. The state can and should be required to get it right when raising revenue by a patently protectionist measure. The judgment should be reversed, and § 144.748 should be declared unconstitutional.

ARGUMENT

I. THE MISSOURI USE TAX DISCRIMINATES AGAINST INTERSTATE COMMERCE AND THEREFORE VIOLATES THE COMMERCE CLAUSE.

The stipulated facts establish that in 841 of the 1573 taxing jurisdictions in Missouri — or 53.5% — the use tax imposed upon goods purchased outside the state exceeds the sales tax that would apply to a purchase of the identical goods within those respective jurisdictions (JA 66). This is because every interstate sale is subject to a 4.225% state-wide use tax plus a mandatory 1.5% additional use tax, whereas intrastate sales are subject to a 4.225% state-wide sales tax and may be, but are not necessarily, subject to an optional local sales tax.

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides that:

> The Congress shall have power... To regulate commerce with foreign nations, and among the several states...."

Although the Commerce Clause is phrased in terms of a grant of power to Congress, it has long been recognized as also having a negative sweep which forbids states from burdening the free flow of commerce across state lines. *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984). The purpose of this aspect of the Commerce Clause is to create "an area of free trade" among the several states. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977), quoting *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976). This "negative" component of the Commerce Clause "prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming v. Oklahoma*, ___ U.S. ___, 112 S.Ct. 789, 800 (1992), quoting *New Energy*

Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988). Where simple economic protectionism is effected by state legislation, a "virtually *per se* rule of invalidity" has been applied. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Applying these principles to the field of taxation, this Court has sustained a tax against Commerce Clause challenge only when it (a) is applied to an activity that has a substantial nexus with the taxing state, (b) is fairly apportioned, (c) does not discriminate against interstate commerce, and (d) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). This case concerns the "discrimination" prong of this test.

A taxing statute discriminates against interstate commerce if it "provid[es] a direct commercial advantage to local business." *Boston Stock Exchange*, 429 U.S. at 329; *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981), quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959). Simply and fundamentally stated, the "dormant" Commerce Clause requires equality of treatment between local and interstate commerce. *Maryland v. Louisiana*, 451 U.S. at 759. As summarized in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), "[a] state may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within a state." Hence, both from the plain language of *Complete Auto* and from the subsequent decisions of this Court, it is indisputable that "no discrimination" means "no discrimination."

A. The Missouri Additional Use Tax Is Inherently Protectionist and Is Facially Invalid Because It Does Not Treat Interstate and Intrastate Commerce Equally.

The Missouri use tax is a levy on the privilege of using, storing or consuming within that state property purchased outside the state which could not be subjected to a Missouri sales tax at the

time of its acquisition. *Director of Revenue v. Superior Aircraft Leasing Co.*, 734 S.W.2d 504, 505-06 (Mo. banc 1987). On a number of occasions, this Court has been called upon to adjudicate the constitutionality of use taxes, cognizant of the fact that the only purpose for a use tax — other than revenue enhancement — is to protect local merchants against foreign competition.[8] The Court long ago announced that the Commerce Clause prohibits states from assessing taxes on the import of goods from other states because otherwise one state could establish a complete system of non-intercourse in commercial relations with all other states. *See, e.g., Guy v. City of Baltimore*, 100 U.S. 434 (1879). An early Missouri scheme that imposed a license tax on all peddlers of goods "which are not the growth, product or manufacture of this state" was struck down in *Welton v. Missouri*, 91 U.S. 275 (1875). Taxes of this kind are by nature balkanizing; and allowing one state to attach a lug to the importation of goods from neighboring states permits the embargo of foreign products, thereby in turn encouraging retaliation and isolationism and eventually destroying the concept of interstate free trade.

On the other hand, the Court has approved use taxes which equalize the tax burden between local transactions and corresponding interstate activities. *Hinson v. Lott*, 75 U.S. 148 (1868). In *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937),

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[8] The Missouri Supreme Court has previously acknowledged the inherently protectionist nature of the Missouri use tax. *See R&M Enterprises, Inc. v. Director of Revenue*, 748 S.W.2d 171, 172 (Mo. banc 1988)("The purpose of the use tax is to protect Missouri revenue and Missouri sellers against competition from out-of-state sellers by removing any advantage which might be gained by making purchases outside the state, on which no sales tax is collected"); *Superior Aircraft Leasing Co.*, 734 S.W.2d at 506 (Use tax "eliminates 'the incentive to purchase from out-of-state merchants in order to escape local taxes thereby keeping in-state merchants competitive with sellers in other states,' and it also provides a means to augment state revenues").

the Court upheld a "complementary" use tax that produced exact parity between local and interstate transactions. The Court's rationale was articulated by Justice Cardozo:

> "Equality is the theme that runs through all the sections of the statute .... When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists when the chattel subjected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local." *Id.* at 583-84.

In contrast to the even-handed use tax sanctioned in *Silas Mason*, the Missouri taxing system facially discriminates against interstate commerce by imposing a mandatory additional 1.5% levy on use-tax transactions that is not applicable to sales-tax transactions. As a result, the resident purchaser of goods in more than half the state's taxing subdivisions will pay a sales tax of less than 5.725%, whereas if he orders the exact same product out of the J.C. Penney catalog, the use tax will be 5.725%. The local merchant therefore obviously has a competitive advantage when seeking customers in those localities, and the would-be Missouri buyer is discouraged from dealing with out-of-state sellers.[9]

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[9] The operation of the Missouri sales/use tax scheme demonstrates that one issue raised below by the intervenor-respondents — whether petitioners are adversely affected by §144.748 and have standing to challenge it — is spurious. As purchasers in interstate transactions, Alumax and various members of AIM pay Missouri use tax, including the additional use tax, on tangible personal property purchased outside of Missouri (JA 33 ¶4); their standing to challenge this tax is identical to that of the in-state manufacturers

(Footnote 9 continued on next page)

The financial implications of the additional use tax are significant. The Department of Revenue, in preparing its fiscal note in support of the bill that eventually became §144.748, estimated that the 1.5% additional use tax would generate between $57.9 million and $77.2 million in fiscal year 1993 (JA 75). Assuming that sales subject to use tax are spread across the state in roughly the same proportion as the population, $15 million to $20 million in additional use taxes in that one year alone would be attributable to transactions occurring in localities having a local sales tax of less than 1.5%.[10]

While lending its imprimatur to truly "complementary" use taxes, this Court has been unflinching in its requirement that the levy imposed on out-of-state competition be precisely *equal* to that assessed against local commerce. Because the use tax is by its nature protectionist and has no other function except to enrich the state fisc, this Court has been especially resolute in its insistence that *any* discrimination is unacceptable. Even slight deviations are not, and should not be, tolerated.

(Footnote 9 continued)

in *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987). Several members of AIM also have standing as out-of-state vendors because they collect and remit Missouri use taxes on sales of personal property made by them from outside Missouri to purchasers within the state (JA 33 ¶4). *E.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984). AIM, of course, has standing to bring a Commerce Clause challenge on behalf of its members who would have standing to sue in their own right. *Boston Stock Exchange*, 429 U.S. at 320 n.3; *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 341-45 (1977).

[10] The additional use tax is imposed on the purchaser, based on his place of residence, whereas the local sales tax is levied on the seller based on the rate applicable where his place of business is located. *See Fabick & Co. v. Schaffner*, 492 S.W.2d 737 (Mo. 1973). Thus, the fact that 26% of the population lives in areas with a local sales tax rate lower than 1.5% is more significant in this case than the fact that only 6.86% of *intra*state sales are made in those areas. But even if we use the latter figure, the additional use tax would still generate $4 million to $5 million annually in those localities.

In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), for example, the Court struck down a Louisiana use tax under the Commerce Clause. Although the Louisiana scheme imposed sales and use taxes at the same rate, in some transactions certain components of out-of-state products were subject to the use tax, whereas those components were not taxed in intrastate sales. The statute also exempted articles bought second-hand within Louisiana, while taxing under the use tax similar goods purchased in a different state and then imported. Even though the Louisiana state court had pronounced the discrepancy in the taxing scheme "incidental," this Court determined that the statute flunked the test of parity and thus ran afoul of the Commerce Clause:

> "The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." *Id.* at 70.

While conceding that the rationale of *Halliburton* and its progeny would "require invalidating §144.748," the Missouri Supreme Court flatly opined that the Commerce Clause "does not require identical treatment of all taxpayers" (Pet. Apdx. A-16, 19).[11] Apart from the Missouri Supreme Court's severe understatement of the extent of the discrimination inherent in the Missouri taxing scheme, that court's thesis that "a little discrimination is okay" is also at odds with, *inter alia*, *Bacchus*, 468 U.S. 263 (1984). The *Bacchus* Court rejected a "*de minimis*" argument based on a substantially smaller percentage of overall sales volume than is present here. *Bacchus* dealt with an excise tax on wholesale liquor sales which exempted certain unique alcoholic

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[11] Chief Justice Robertson, in dissent, chided his colleagues for "elevating the cynic's conclusion about bureaucratic inefficiency to constitutional heights" by blessing such a patch-work taxing scheme on the theory that it was "close enough for government work" (Pet. Apdx. A-25).

beverages produced only in the taxing state. Even though the exempted sales counted for no more than 0.7739% of total liquor sales (*id.* at 268 n.9), the Court banned such discrimination against out-of-state producers as constitutionally impermissible. The Court said:

> "Likewise, the effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products. Consequently, as long as there is some competition between the locally produced exempt products and non-exempt products from outside the state, there is a discriminatory effect." *Id.* at 271.

Similarly, in *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 276 (1988), the Court held that even if only one in-state resident is benefited and one out-of-state manufacturer adversely impacted, the Commerce Clause has still been violated because "neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown."

The extent of the Missouri Supreme Court's constitutional misadventure is further illustrated by *Maryland v. Louisiana*, 451 U.S. 725 (1981), which involved a Commerce Clause challenge to a "first use" tax imposed by Louisiana on the production of natural gas. The tax was assessed against the first use of any gas imported into Louisiana and not previously taxed by another state or the United States. It was equal to the Louisiana severance tax imposed on in-state producers and was designed to equalize competition. Nonetheless, this Court, noting that Louisiana gave some credits to local interests that were not available to nonresident producers, invalidated the statute. The Court found the tax discriminatory because it provided a direct advantage to local business and thus violated the "common thread" running through the cases upholding compensatory

taxes — *i.e.*: "the equality of treatment between local and interstate commerce." *Id.* at 759.[12]

Maryland v. Louisiana was an original proceeding decided by this Court on the pleadings. Louisiana urged that further hearings were appropriate to enable it to show that the discrimination was minimal. The Court denied that request and declared the statute unconstitutional as a matter of law, stating:

> "It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the Tax unconstitutional and eliminating discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Id.* at 759-60.

This approach was recently reaffirmed in *Chemical Waste Management, Inc. v. Hunt*, ___ U.S. ___, 112 S.Ct. 2009, 2014 (1992)("Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry"); *accord*, *Wyoming v. Oklahoma*, 112 S. Ct. at 801 ("The volume of commerce affected measures only the *extent* of

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[12] The differing treatment of exemptions and credits that fatally afflicted the Louisiana "first use" tax is also present in the Missouri additional use tax and provides yet another basis for finding it facially invalid. A comparison of §144.615(2) with §144.615(5), both of which are applicable to the additional use tax pursuant to §144.748.2, plainly reveals that purchases made within Missouri are treated more favorably for purposes of use-tax credits than purchases made from another state. Section 144.615(2) grants a total *exemption* from use tax for any property bought in Missouri and subjected to a sales tax *in any amount*. By contrast, property purchased in another state gets only a use-tax *credit* under §144.615(5) limited to the amount of the sales tax paid to the other state. This is another significant departure from the use tax statute upheld in *Silas Mason*, which provided an identical credit for in-state and out-of-state transactions.

the discrimination; it is of no relevance to the determination whether a state has discriminated against interstate commerce").[13]

This Court has observed that in the oft-times murky world of sales and use taxes, there is much to be said for bright-line tests which can be readily understood and can form the basis for consistent, conforming conduct. In *Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904, 1914-15 (1992), the Court noted that bright-line rules sometimes create artificiality at their outer edges but that any such artificiality "is more than offset by the benefits of a clear rule ..." which "... firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes." In the present context, a rule of strict nondiscrimination does not produce any artificiality, and reinforcement of the bright-line requirement of equality between interstate and intrastate transactions will serve to dissuade states from experimenting with creative and convoluted end-runs around the Commerce Clause.

B. The Missouri Additional Use Tax Is Not "Complementary" to the Sales Tax, and the Overall Comparison of State-wide Use Tax Collections to Sales Tax Collections Is Irrelevant.

In addition to their unpersuasive attempts to trivialize the disparity created by the Missouri system, respondents argued below — and the Missouri Supreme Court agreed — that the Missouri use tax passed constitutional muster because, on balance, more sales taxes than use taxes were collected in the state.

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[13] Of course, even if some leeway were constitutionally acceptable, the Missouri use tax could not be salvaged because, by any standard, the discrimination reflected in the record of this case is substantial and pervasive and involves millions of tax dollars annually. Hence, notwithstanding Chief Justice Robertson's characterization of the issue in his dissent, this case is not about a *de minimis* exception to the Commerce Clause.

The court acknowledged "that the Missouri scheme of state and local sales and use taxes does not provide for an equal burden in all situations" (Pet. Apdx. A-16). In a masterpiece of understatement, the majority remarked that the taxing mechanism on trial here "is slightly different from the typical complementary sales/use tax scheme sanctioned in *Henneford*" (Pet. Apdx. A-9). But it nonetheless legitimized the Missouri system because, on balance, the state-wide collection of sales taxes more than "compensated" for the discriminatory burden imposed on interstate commerce in certain portions of the state. This analysis is skewed, and the Missouri scheme is poles apart from any system of "compensatory" or "complementary" taxes that has ever survived Commerce Clause scrutiny in this Court.

The proper focus cannot be the state-wide effect of a myriad of different tax rates or the aggregate of taxes levied on different transactions in different parts of the state. The fact that more revenues are generated overall by Missouri's sales taxes than its use taxes is constitutionally beside the point. In *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), the taxing state argued that a flat tax on interstate and local vehicles did not discriminate, even though local vehicles used state highways five times as much as interstate vehicles, because it was merely a small part of a multi-tiered scheme and, overall, domestic trucks paid a higher price to use state highways than those registered in other states. Quoting J. HELLERSTEIN, STATE TAXATION ¶ 4.12[5], p. 150 (1983), the Court rebuffed the notion that the Commerce Clause was satisfied by such "offsets":

> "'[I]mplementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing state on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens.'" 483 U.S. at 289.

This Court has consistently ruled that taxes on different events or transactions cannot be used to even up the interstate score. In *Tyler Pipe Industries*, 483 U.S. 232, the Court held that a tax on the manufacture of products ultimately sold out-of-state could not be deemed to compensate for the state's inability to impose a wholesale tax on those foreign sales. In *Maryland v. Louisiana*, the "first use" tax on imported natural gas could not be justified by a severance tax imposed on in-state producers because, according to the Court, "the two events are not comparable." 451 U.S. at 759. *Accord, Boston Stock Exchange*, 429 U.S. at 332 (extra tax burden on out-of-state sales not sustainable where it does not compensate for a like burden on in-state sales); *Westinghouse Electric*, 466 U.S. at 405-07 (overall taxing scheme cannot be used to justify even "slight" discrimination against interstate commerce).[14]

Just last term the Court rejected the suggestion that a state may balance discrimination in one county by showing hospitality to interstate commerce in another. In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, ___ U.S. ___, 112 S.Ct. 2019 (1992), the State of Michigan made the similar claim that the discriminatory character of its waste disposal statute was ameliorated because several Michigan counties accepted out-of-state waste pursuant to a local option provided in the statute. The Court squarely repudiated this theory with the common-sense observation that in a county which had not exercised the option the discrimination "is unaffected by the fact that some other counties have adopted a different policy." 112 S.Ct. at 2025. Similarly here, the discrimination created on the

[14] Likewise, in *Armco, Inc.*, 467 U.S. 638, the state sought to defend a 0.22% gross receipts tax that exempted resident manufacturers by arguing that those local concerns paid a manufacturing tax of 0.88%. The Court said that the manufacturing tax could not be used to offset the discriminatory effect of the gross sales tax imposed on out-of-state competitors because manufacturing and wholesaling are not "substantially equivalent events." *Id.* at 643.

face of the statute is not cured by the local decisions made by less than half of Missouri's taxing jurisdictions.

To allow the state to justify discrimination based on statewide statistics would also be inconsistent with this Court's decisions rejecting arguments that governmental actions which burden or discriminate against interstate commerce should be upheld where only part of the interstate market is adversely affected, *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 377-78 (1964), or where the actions are also detrimental to certain intrastate transactions, *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 n.4 (1951). *Cf., Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816 (1993) (upholding equal protection challenge to gerrymander despite fact that whites were not proportionately underrepresented in congressional delegation).

One of the objectives of the Commerce Clause is a marketplace in which buy/sell decisions are not influenced by differentials in sales and use taxes. Endorsement of the Missouri Supreme Court's rationale would invite the creation of a multiplicity of preferential trade areas destructive of the very purpose of the Commerce Clause. For instance, Missouri could impose a use tax of 10% on all sales into the state by Kansas merchants but offset the burden of that levy by making all sales from Illinois tax-free. No one, we assume, would defend the legitimacy of such a system under the Commerce Clause, but it is conceptually indistinguishable from the Missouri sales/use tax arrangement currently before the Court. Just as the favorable treatment of customers of Illinois vendors could not fairly be described as "compensating" for the tariffs on Kansas products, so too here, the handicap accruing to nonresident merchants selling goods into the 841 jurisdictions where use taxes are higher than sales taxes is not "compensated" by different tax rates on different transactions conducted by different vendors in different counties.

In order to survive inspection under the Commerce Clause, a use tax must literally be "complementary" to the corresponding

sales tax imposed on "competing local business." HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION §2.19, p. 128 (1981). *Silas Mason* and its progeny, including *Halliburton*, have conditioned any approval of a "complementary" or "compensating" use tax upon the requirement that the nonresident merchant be accorded parity with his in-state competitors and that apples be compared to apples. In *Halliburton*, for example, the Louisiana Supreme Court had upheld the validity of the use tax by comparing the burden of the out-of-state manufacturer with that of the in-state retailer, who was subject to the same *rate* of tax. This Court disagreed, ruling that the proper comparison was between the out-of-state manufacturer and the in-state taxpayer who was most similarly situated — the local manufacturer. 373 U.S. at 71. Applying the "strict rule of equality adopted in *Silas Mason*," the *Halliburton* Court voided the Louisiana use tax for reasons that are squarely applicable here.

When out-of-state merchants doing business with customers in a given Missouri city or county are compared to the in-state taxpayers with whom they are most similarly situated — local vendors selling similar products — they are at a competitive disadvantage in more than half of Missouri's taxing subdivisions. The logical underpinning for validation of a "compensating" use tax is that it creates a level playing field for both the local merchant and the foreign enterprise in their pursuit of the same customer. That goal is not achieved by a scheme which requires a Washington apple grower to charge more tax than his local counterpart on sales into Dunklin County, Missouri, while permitting a Florida purveyor of oranges to collect a use tax on sales into Kansas City at a rate less than the local sales tax rate. The Washington apple seller is at a competitive disadvantage for which the Florida orange grower cannot constitutionally "compensate." And a Dunklin County apple connoisseur can derive little solace from the knowledge that if he lived in Kansas City

it would be comparatively cheaper, rather than more expensive, to buy from nonresident orchards.[15]

Use taxes that are truly "complementary" or "compensating" pass muster under the Commerce Clause only because the burden on a foreign merchant is equal to that of his local competitor and a resident buyer can choose between local and foreign vendors without regard to sales/use tax differentials. In *Boston Stock Exchange*, 429 U.S. at 332, the Court summarized the narrow scope of the doctrine of "compensating" use taxes:

> "In all the use tax cases, an individual faced with the choice of an in-state or out-of-state purchase could make that choice without regard to the tax consequences. If he purchased in State, he paid a sales tax; if he purchased out of State but carried the article back for use in State, he paid a use tax on the same amount. The taxes treated both transactions in the same manner."

The suggestion that discrimination against one out-of-state vendor can be ignored because there is a lesser burden in a different county on another nonresident seller perverts the concept of "compensating" or "complementary" taxes and is logically and legally flawed.

C. A Discriminatory Use Tax Cannot Be Justified by "Administrative Convenience."

As noted earlier, the Missouri General Assembly had adopted a statutory provision in 1990 that permitted local taxing units to adopt a local use tax as long as it was paired with an equivalent local sales tax. Mo. Laws 1990, H.B. 960 §1. That measure, which became §144.747, RSMo, was repealed in favor of the state-wide 1.5% additional use tax enacted in 1991 as §144.748

[15] Viewed another way, the Missouri Supreme Court's reliance on statewide statistics to justify discrimination on the local level is incompatible with the holding in *Dennis v. Higgins*, 498 U.S. 439 (1991), that the Commerce Clause confers *individual* rights.

by Mo. Laws 1991, H.B. 25. Respondents (especially intervenors) defended this legislative action by arguing below that a state-wide system which required a local use tax to be matched with a corresponding local sales tax was too hard to implement and too costly. Such attempts to justify discriminatory taxes on the basis of administrative convenience have never been accepted by this Court. *See Halliburton*, 373 U.S. at 74; *Kraft General Foods*, 112 S.Ct. 2365.

In the context of a pure revenue measure, it is hardly unfair or oppressive to require a state to adopt a scheme that taxes interstate and intrastate commerce equally. It is, frankly, unbecoming for a state to try to justify a protectionist measure of this type on the grounds that a system of fairness is unwieldy or more costly to administer.

Other states do not seem to have had difficulty keeping use tax rates within the clearly delineated bounds outlined in cases from this Court. The parties stipulated below that "[a]s of December 31, 1991, twenty-eight states other than Missouri authorized some form of local use tax. None of these states authorized the imposition of a local use tax at a rate higher than the local sales tax within the same taxing jurisdiction" (JA 35 ¶15).[16] The

[16] Parity between use tax rates and sales tax rates can be accomplished in a variety of ways. Some states simply impose state-wide sales taxes and state-wide use taxes by statute at the same rate. *E.g.*, Okla. Stat. tit. 68 §§1354, 1402. Others specifically require that if a local use tax is enacted, it must be at the same rate as the local sales tax. *E.g.*, Alaska Stat. § 29.45.650. Some statutory provisions automatically impose a local use tax — at the same rate — upon passage of a local sales tax. *E.g.*, Ark. Code § 26-74-223; § 26-74-319 (county-wide taxes); Kan. Stat. § 12-198; Minn. Stat. § 297A.14. subd.3 (county-wide taxes); Ohio Rev. Code §5741.021-.023; Wyo. Stat. §39-6-518(b), (e). Other states require local taxing units to couple local sales and compensating use taxes in the same measure, thus conditioning the enactment of a local use tax upon the simultaneous adoption of an equivalent sales tax. *E.g.*, Ark. Code § 26-75-201 (municipal sales and use tax); Fla. Stat. ch. 212.054, *et seq.*; Ga. Code § 48-8-82, §48-8-110; Haw. Rev. Stat. § 46-16.7; La. Rev. Stat. §33:2711; Neb. Rev. Stat. §77-27,142; S.C. Code §4-10-20; S.D. Codified Laws §10-52-2; Tenn. Code Ann. §67-6-702.

Commerce Clause demands that the privilege of taxing interstate commerce be cautiously and conscientiously exercised, and the experience of these other states belies respondents' "administrative convenience" argument.

II. THIS COURT'S DECISION IN *GENERAL AMERICAN TANK CAR CORP. V. DAY*, 270 U.S. 367 (1926), DOES NOT SUPPORT THE RESULT REACHED BY THE MISSOURI SUPREME COURT.

The Missouri Supreme Court paid little heed to *Halliburton* and the other use tax cases from this Court but instead relied almost completely on the 1926 decision in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), to vindicate the Missouri use tax scheme, notwithstanding its pervasively discriminatory structure. The majority opinion hailed the *General American* approach as "more flexible" and "more practical" (Pet. Apdx. A-13).

The major flaw in this analysis is that the portion of *General American* which the Missouri Supreme Court found so alluring did not purport to be a discourse on the Commerce Clause. Indeed, *General American* was decided against the background of the "now rejected notion that only 'direct' burdens on interstate commerce were disapproved." *Armco, Inc.*, 467 U.S. at 643 n.7. *General American* has never been relied on in any of this Court's subsequent Commerce Clause decisions and, in fact, has not been cited by this Court in any context in almost 50 years. Rather than being left to drift through the casebooks as a derelict hazard confusing the lower courts, *General American* should either be moored to its facts or sunk.

General American involved a Louisiana tax of "25 mills on the dollar 'of the assessed value of all rolling stock of nonresident... corporations, having no domicile in the State of Louisiana....'" 270 U.S. at 370. The tax was imposed not on a transaction but on a foreign corporation's property in Louisiana

and was in lieu of all local property taxes; *General American*, therefore, was not a sales/use tax case. Because the nonresident corporation could avoid the additional property tax by "becoming domiciled in a parish" and paying the local taxes without changing its actual business operations, the taxpayer's principal Commerce Clause challenge was that the statute was a "thinly disguised attempt to compel nonresidents doing interstate business in Louisiana to declare a domicile in this state." *Id.* at 372.

It was in this context that this Court considered whether the tax on the nonresident's property was "substantially" greater than the tax on residents. The Court upheld the Louisiana tax because the difference between the taxes on the property of resident and nonresident corporations was, on the record before the Court, *de minimis*. Absent a showing of discrimination "in some substantial way," the Court refused to infer that the Louisiana tax was really an attempt "to require the nonresident corporation to take out a license to do business within the state." *Id.* In other words, contrary to the interpretation placed on *General American* by the Missouri Supreme Court, that case did not hold that taxing an interstate transaction more than an intrastate transaction was permissible if the discrimination was small or localized. Rather, the *General American* Court merely refused to infer that a small or localized extra burden on the nonresident corporation was necessarily an unconstitutional attempt to force that corporation to become domiciled in the state.[17]

The majority opinion below acknowledged the lack of congruity inherent in the Missouri sales/use tax legislation and conceded that "an exacting application of the dicta contained in *Halliburton* and certain cases following it would require invalidating §144.748" (Pet. Apdx. A-16). But it then went on to hold

[17] Technically, *General American*'s discussion of the effects of discrimination was *dicta* because the Court ruled that, due to deficiencies in the evidence, the taxpayer ". . . has laid no foundation for assailing [the tax's] constitutionality." *Id.* at 375.

that even if *Halliburton* and its progeny cannot be distinguished, "they are nonetheless inconsistent with *General American*." Finding itself torn between two supposedly conflicting lines of authority, the court opted for the course of least resistance, saying that "in the face of inconsistent precedent from the United States Supreme Court, we will presume our state's statutes to be constitutional" (Pet. Apdx. A-19 n.9).[18]

The dissenting opinion of Chief Justice Robertson in the Missouri Supreme Court cogently observed that *General American* is inapposite for at least four reasons: (1) The language relied on by the majority below was developed in connection with due process and equal protection analysis, rather than with regard to the Commerce Clause; (2) *General American* dealt with property taxes rather than a sales/use tax scheme; (3) to the extent that *General American* engaged in a Commerce Clause analysis, that discussion was "abbreviated and now highly suspect" in light of recent cases such as *Kraft General Foods*, *Westinghouse Electric* and *Halliburton*; and (4) in *General American* the variation between in-state and out-of-state tax burdens was characterized as an "occasional inequality" that had occurred "one year," whereas the discrimination embedded in the Missouri use tax is systemic and permanent. *Id.* at A-29-30.

[18] Apart from being inappropriately premised on *General American*, this reliance on a presumption was misconceived. The generalized "presumption" in favor of constitutionality is really a vehicle for articulating a standard of review and does not affect the threshold judicial determination of whether there is discrimination. *See Parham v. Hughes*, 441 U.S. 347, 351-52 (1979) (plurality opinion). Moreover, the extent of any "presumption" varies with the type of legislation, *id.* at 351, and nowhere in this Court's modern Commerce Clause decisions is there any suggestion that a presumption may be used to justify demonstrated discrimination against interstate commerce. Indeed, as noted earlier, economic protectionism is subject to a "virtually *per se* rule of invalidity." *City of Philadelphia v. New Jersey*, 437 U.S. at 642. *See also Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (statute infringing right to interstate travel presumed unconstitutional); *McLaughlin v. Florida*, 379 U.S. 184, 191-93 (1964) (statute drawing racial classification presumed unconstitutional).

Despite its obvious inapplicability, *General American* has been a rallying point for some state courts desirous of sustaining local measures which protect and assist in-state merchants. *See Dep't of Revenue v. Warren Petroleum Corp.*, 119 N.E.2d 215 (Ill. 1954); *Lane Construction Corp. v. Comptroller of Treasury*, 178 A.2d 904 (Md. 1962); *Don McCullagh, Inc. v. State*, 93 N.W.2d 252 (Mich. 1958); *National Can Corporation v. State of Washington*, 715 P.2d 128 (Wash. 1986), *vacated sub nom. Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987).[19]

It is therefore appropriate and necessary for the Court to take this opportunity to spell out the limited import of *General American*. That case did not hold, even by implication, that discriminatory use taxes collected in more than half the state can be validated by increased sales taxes imposed in the rest of the state. *General American* was never designed as a Commerce Clause treatise on discriminatory taxation and has never been regarded as such by this Court. To the extent that it can be so read, it fosters unacceptable inequities, is inconsistent with every subsequent case from this Court — particularly in the sales/use tax context — and should be explicitly limited or overruled in pertinent part.

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[19] On the other hand, the highest courts of Ohio, Oklahoma and California have refused to be seduced by the siren of enhanced use taxes and have faithfully adhered to this Court's teachings in the use tax field. *See American Modulars Corporation v. Lindley*, 376 N.E.2d 575 (Ohio), *cert. denied*, 439 U.S. 911 (1978)(system in which some counties imposed use taxes on all property purchased out-of-state but not on all property purchased in-state impermissibly discriminated against interstate commerce); *Phillips v. Oklahoma Tax Comm'n*, 577 P.2d 1278 (Okla. 1978)(where state imposed use tax of 4% and sales tax of 2%, with local option to add 1-3%, scheme violated Commerce Clause); *Woosley v. State of California*, 838 P.2d 758 (Cal. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2416 (1993) (difference in tax base between resident and nonresident motor vehicles for calculation of use tax constituted "patent" violation of Commerce Clause).

CONCLUSION

For the reasons stated, the judgment of the Supreme Court of Missouri should be reversed and §144.748 RSMo declared unconstitutional; the cause should be remanded with instructions to enjoin Respondent Lohman from collecting the additional 1.5% use tax and for such further proceedings as may be required in accordance with this Court's opinion.

Respectfully submitted,

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ADDENDUM

REVISED STATUTES OF MISSOURI

SALES TAX

§144.020. Rate of tax.—1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:

(1) Upon every retail sale in this state of tangible personal property, a tax equivalent to four percent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to four percent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange, except as otherwise provided in section 144.025; ***

§144.021. Imposition of tax—seller's duties.—The purpose and intent of sections 144.010 to 144.510 is to impose a tax upon the privilege of engaging in the business, in this state, of selling tangible personal property and those services listed in section 144.020. The primary tax burden is placed upon the seller making the taxable sales of property or service and is levied at the rate provided for in section 144.020. ***

§144.030. Exemptions from state and local sales and use taxes.—1. There is hereby specifically exempted from the provisions of sections 144.010 to 144.525 and from the computation of the tax levied, assessed or payable under sections 144.010 to 144.525 such retail sales as may be made in commerce between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the state of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the general

assembly of the state of Missouri is prohibited from taxing or further taxing by the constitution of this state.

§144.060. Purchaser to pay sales tax—refusal, a misdemeanor—exception.—It shall be the duty of every person making any purchase or receiving any service upon which a tax is imposed by sections 144.010 to 144.510 to pay, to the extent possible under the provisions of section 144.285, the amount of such tax to the person making such sale or rendering such service; any person who shall willfully and intentionally refuse to pay such tax shall be guilty of a misdemeanor; * * *

§144.190. Refund of overpayments—claim for refund—time for making claims—paid to whom—direct pay agreement for certain purchasers, collection fee deduction not permitted.

* * *

2. If any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person legally obligated to remit the tax under sections 144.010 to 144.510, and the balance, with interest as determined by section 32.065, RSMo, shall be refunded to the person legally obligated to remit the tax, but no such credit or refund shall be allowed unless duplicate copies of a claim for refund are filed within three years from date of overpayment.

USE TAX

§144.600. Title of law.—This law may be cited as the "Compensating Use Tax Law".

§144.610. Tax imposed, property subject, who liable.—1. A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property purchased on or after the effective date of sections 144.600 to 144.745 in an amount equivalent to the percentage imposed on

the sales price in the sales tax law in section 144.020. This tax does not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this state until the transportation of the article has finally come to rest within this state or until the article has become commingled with the general mass of property of this state.

2. Every person storing, using or consuming in this state tangible personal property purchased from a vendor is liable for the tax imposed by this law, and the liability shall not be extinguished until the tax is paid to this state, but a receipt from a vendor authorized by the director of revenue under the rules and regulations that he prescribes to collect the tax, given to the purchaser in accordance with the provisions of section 144.650, relieves the purchaser from further liability for the tax to which receipt refers.

§144.615. Exemptions.—There are specifically exempted from the taxes levied in sections 144.600 to 144.745:

(1) Property, the storage, use or consumption of which this state is prohibited from taxing under the constitution or laws of the United States or of this state;

(2) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed under the Missouri sales tax law;

(3) Tangible personal property, the sale of which, if made in this state, would be exempt from or not subject to the Missouri sales tax under the provisions of subsections 2 and 3 of section 144.030;

(4) Motor vehicles, trailers, boats, and outboard motors subject to the tax imposed by section 144.440;

(5) Tangible personal property which has been subjected to a tax by any other state in this respect to its sales or use; provided, if such tax is less than the tax imposed by sections 144.600 to 144.745. such property, if otherwise taxable, shall be subject to a tax equal to the difference between such tax and the tax imposed by sections 144.600 to 144.745;

(6) Tangible personal property held by processors, retailers, importers, manufacturers, wholesalers, or jobbers solely for resale in the regular course of business;

(7) Personal and household effects and farm machinery used while an individual was a bona fide resident of another state and who thereafter became a resident of this state, or tangible personal property brought into the state by a non-resident for his own storage, use or consumption while temporarily within the state.

§144.635. Vendor to collect tax from purchasers—selling agent not liable to tax, when.—Every vendor making a sale of tangible personal property for the purpose of storage, use or consumption in this state shall collect from the purchaser an amount equal to the percentage on the sale price imposed by the sales tax law in section 144.020 and give the purchaser a receipt therefor. The required amount of the tax collected by the vendor from the purchaser shall be shown separately upon the sales slip or other evidence of sale. If a vendor is a selling agent as defined in section 144.605, and receives compensation by reason of a sale made pursuant to an order given directly to his principal by the purchaser, of which the selling agent had no knowledge at the time of the sale, and in which the selling agent did not actively or inactively participate, the selling agent shall be relieved of all liability for the collection and remittance of the taxes imposed under sections 144.600 to 144.745. Furthermore, if payment is made by the purchaser directly to the principal and the selling agent is unable to collect the tax from the purchaser, the selling

agent will be relieved from all liability for the collection of the tax imposed under sections 144.600 to 144.745 from the purchaser. Selling agents may avoid all responsibility for collection of the taxes imposed under sections 144.600 to 144.745, if their principal is a vendor registered with the director of revenue for the collection of such taxes.

§144.655. Return, when filed—payment, when due.—1. Every vendor, on or before the last day of the month following each calendar quarterly period of three months, shall file with the director or revenue a return of all taxes collected for the preceding quarter in the form prescribed by the director of revenue, showing the total sales price of the tangible personal property sold by the vendor, the storage, use or consumption of which is subject to the tax levied by this law, and other information the director of revenue deems necessary. The return shall be accompanied by a remittance of the amount of the tax required to be collected by the vendor during the period covered by the return. Returns shall be signed by the vendor or his authorized agent.

* * * *

4. Every person purchasing tangible personal property, the storage, use or consumption of which is subject to the tax levied by sections 144.600 to 144.745, who has not paid the tax due to a vendor registered in accordance with the provisions of section 144.650, shall, on or before the last day of the month following each calendar quarterly period of three months, file with the director of revenue a return for the preceding quarter in the form that the director of revenue prescribes, showing the total sales price of the tangible property purchased during the preceding quarter and any other information that the director of revenue deems necessary for the proper administration of sections 144.600 to 144.745. The return shall be accompanied by a remittance of the amount of the tax required by sections 144.600 to 144.745 to

be paid by the person. Returns shall be signed by the person liable for the tax or his duly authorized agent.

§144.696. Refund of overpayments—claim for refund—time for making claims.—Section 144.190, pertaining to the refund of overpayments, claims for refund, and the time within which refunds shall be claimed, is applicable to the tax levied under the compensating use tax law.

§144.735. Failure to make return, pay tax or keep records, penalty.—Any person required under sections 144.600 to 144.745 to pay any tax, or required by sections 144.600 to 144.745 to make a return, keep any records or supply any information, who with intent to defraud willfully fails to pay such tax, make such return, keep such records or supply such information, at the time or times required by law, shall, in addition to other penalties provided by law, and upon conviction thereof, be fined not more than ten thousand dollars, or be imprisoned in the county jail for not more than one year or by not less than two nor more than five years in the state penitentiary or by both fine and imprisonment together with the cost of prosecution.

§144.745. Violation not having a specific penalty deemed a misdemeanor.—Any person violating any of the provisions of sections 144.600 to 144.745 for which no criminal penalty is otherwise provided, upon conviction thereof, shall be deemed guilty of a misdemeanor.

§144.747. Other provisions of law notwithstanding, whenever a political subdivision is authorized to levy a sales tax, the political subdivision shall also be authorized to levy a use tax at the same rate which shall be applied in the same manner as the state use tax pursuant to this chapter. (Enacted as H.B. 960, 1990; repealed by H.B. 25, 1991).

§144.748. Additional use tax, rate collection — deposit in local use tax fund, not part of state revenue — investment — distribution to political subdivisions, procedure — unexpended balance not to lapse into general revenue. — 1. In addition to the taxes imposed by section 144.610, there is hereby imposed an additional use tax in the amount of one and one-half percent upon all transactions which are subject to the taxes imposed under sections 144.600 to 144.745. This tax shall be collected and remitted together with the taxes imposed under sections 144.600 to 144.745.

2. All provisions of sections 144.600 to 144.745 are hereby made applicable to the tax imposed under subsection 1 of this section except as herein provided and the director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the tax.

3. All such use taxes collected by the director of revenue, less one percent for cost of collection which shall be deposited in the state's general revenue fund, shall be deposited in the "Local Use Tax Fund", which is hereby established, and shall be distributed as provided in this section in accordance with article X, section 10(b), Constitution of Missouri.

4. The additional revenue generated by this section shall not be part of the "total state revenue" within the meaning of article X, sections 17 and 18, Constitution of Missouri. The expenditure of this additional revenue shall not be an "expense of state government" under article X, section 20, Constitution of Missouri.

5. The director of revenue shall invest moneys in the local use tax fund in the same manner as nonstate funds are invested pursuant to article IV, section 15, Constitution of Missouri. All earnings resulting from the investment of moneys in the local use tax fund shall be credited to the local use tax fund.

6. Not later than the tenth day following the end of each month, the director shall distribute all moneys in the local use tax fund to each political subdivision imposing a local sales tax that is collected by the director on behalf of such political subdivision based upon the political subdivision's pro rata percentage as determined by subsection 7 of this section, except as provided in subsection 10 of this section.

7. The director of revenue shall divide the amount of local sales tax moneys distributed to each such political subdivision each month by the total amount of local sales tax moneys distributed that month to determine that political subdivision's pro rata percentage.

8. The provisions of section 33.080, RSMo, requiring all unexpended balances remaining in various state funds to be transferred and placed to the credit of the ordinary revenue fund of this state at the end of each biennium shall not apply to the local use tax fund.

9. The tax imposed under this section shall be submitted to the voters of this state only in the event that a final decision of a court of competent jurisdiction holds that the provisions of this section require voter approval.

10. After determining the amounts due pursuant to subsections 6 and 7 of this section, the director of revenue shall add the amounts that would be due all political subdivisions within any county of the first classification having a charter form of government and having a population of nine hundred thousand or more inhabitants together with the amount that would be due the unincorporated areas of such county to obtain a sum total. The director shall distribute one-third of such sum total to the county and to each city, town and village in group B according to section 66.620, RSMo, as modified by this section, a portion of the remainder of such sum total equal to the percentage ratio that the population of each such city, town and village bears to the total

population of all such group B cities, towns and villages. For the purposes of this subsection, population shall be determined by the last federal decennial census or the latest census that determines the total population of the county and all political subdivisions therein. For the purpose of this subsection, beginning on January 1, 1994, and annually thereafter, each city, town or village in group A according to section 66.620, RSMo, but whose per capita sales tax receipts during the preceding calendar year pursuant to sections 66.600 to 66.630, RSMo, were less than the per capita county-wide average of all sales tax receipts during the preceding calendar year, shall be treated as a group B city, town or village until the per capita amount distributed to such city, town or village equals the difference between the per capita sales tax receipts during the preceding calendar year and the per capita county-wide average of all sales tax receipts during the preceding calendar year.

CONSTITUTION OF MISSOURI, 1945, As Amended

Article IV

Section 43(a). Sales tax, use for conservation purposes. For the purpose of providing additional moneys to be expended and used by the conservation commission, department of conservation, for the control, management, restoration, conservation and regulation of bird, fish, game, forestry and wildlife resources of the state, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto, an additional sales tax of one-eighth of one percent is hereby levied and imposed upon all sellers for the privilege of selling tangible personal property or rendering taxable services at retail in this state upon the sales and services which now are or hereafter are listed and set forth in, and, except as to the amount of tax, subject to the provisions of and to be collected as provided in the "Sales Tax Law" and subject to the rules and regulations promulgated in connection therewith; and

an additional use tax of one-eighth of one percent is levied and imposed for the privilege of storing, using or consuming within this state any article of tangible personal property as set forth and provided in the "Compensating Use Tax Law" and, except as to the amount of the tax, subject to the provisions of and to be collected as provided in the "Compensating Use Tax Law" and subject to the rules and regulations promulgated in connection therewith.

Section 47(a). Sales and use tax levied for soil and water conservation and for state parks.—Sales and use tax levied for soil and water conservation and for state parks. For the purpose of providing additional monies to be expended and used by the department of natural resources through the state soil and water districts commission as defined in Section 278.070, RSMo, 1986, for the saving of the soil and water of this state for the conservation of the productive power of Missouri agricultural land, and by the department of natural resources for the acquisition, development, maintenance and operation of state parks in accordance with Chapter 253, RSMo, 1986, and for the administration of the laws pertaining thereto, an additional sales tax of one-tenth of one percent is hereby levied and imposed upon all sellers for the privilege of selling tangible personal property or rendering taxable services at retail in this state upon the sales and services which now are or hereafter are listed and set forth in, and, except as to the amount of tax, subject to the provisions of and to be collected as provided in the "Sales Tax Law" and subject to the rules and regulations promulgated in connection therewith; and an additional use tax of one-tenth of one percent is levied and imposed for the privilege of storing, using or consuming within this state any article of tangible personal property as set forth and provided in the "Compensating Use Tax Law" and, except as to the amount of the tax, subject to the provisions of and to be collected as provided in the "Compensating Use Tax Law" and subject to the rules and regulations promulgated in connection therewith.